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6                   **IN THE UNITED STATES DISTRICT COURT**  
7                   **FOR THE DISTRICT OF ARIZONA**

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9      Abigail Ratchford, et al.,

No. CV-22-01629-PHX-SMM

10                 Plaintiffs,

**ORDER**

11                 v.

12      Watford Specialty Insurance Company,

13                 Defendant.

14

15      Pending before the Court is Defendant's Motion to Dismiss. (Doc. 14). For the  
16 following reasons, the Court grants the Motion.

17      **I. BACKGROUND**

18      This case stems out of two earlier cases, in which Plaintiffs—thirteen professional  
19 models—sued two strip clubs for misappropriating their images and likenesses and using  
20 them in advertisements. (Doc. 1 at 2). The Dalton Plaintiffs sued Dalton Corporation  
21 (“Dalton”), which owns Chicas Cabaret in Phoenix, Arizona, in the U.S. District Court for  
22 the District of Arizona. (Id. at 3); Ratchford v. Dalton Corp., Case No. 19-cv-1421-PHX-  
23 SRB. They secured a \$565,000 consent judgment. (Doc. 1 at 3); (Doc. 1-2 at 4). The 4Play  
24 Plaintiffs sued 4Play Gentlemen’s Lounge, LLC (“4Play”) in Florida state court and  
25 secured a \$675,000 consent judgment. (Doc. 1 at 3, 12); Gray v. 4Play Gentlemens Lounge  
26 LLC, Case No. 20-004534-CI (Fla. Cir. Ct.).

27      Both strip clubs were insured at the time by commercial general liability insurance  
28 policies (“the Policies”) issued by Defendant Watford Specialty Insurance Company

1 (“Watford”). (Doc. 1 at 3).<sup>1</sup> The Dalton Policy covered a period between February 12, 2017  
 2 and February 12, 2018. (Doc. 1 at 6). The 4Play Policy<sup>2</sup> covered a period between August  
 3 4, 2016 and August 4, 2018. (Id. at 9).

4 The Policies contain a section pertaining to “personal and advertising injury  
 5 liability.” (Doc. 14-2 at 41-44). Section 1 states that Watford will “pay those sums that the  
 6 insured becomes legally obligated to pay as damages because of ‘personal and advertising  
 7 injury’ to which this insurance applies. We will have the right and duty to defend against  
 8 any ‘suit’ seeking those damages. However, we will have no duty to defend the insured  
 9 against any ‘suit’ seeking damages for ‘personal and advertising injury’ to which this  
 10 insurance does not apply.” (Id. at 41).

11 “Personal and advertising injury” is defined as “injury . . . arising out of one or more  
 12 of the following offenses:

- 13     a. False arrest, detention or imprisonment;
- 14     b. Malicious prosecution;
- 15     c. The wrongful eviction from, wrongful entry into, or invasion of the right of  
       private occupancy of a room, dwelling or premises. . . ;
- 16     d. Oral or written publication, in any manner, of material that slanders or libels a  
       person or organization or disparages a person’s or organization’s goods,  
       products, or services;
- 17     e. Oral or written publication, in any manner, of material that violates a person’s  
       right of privacy;
- 18     f. Oral or written publication, in any manner, of another’s images, photographs,  
       likenesses or personal attributes.”

24 (Id. at 47).

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25 <sup>1</sup> The Court considers these Policies under the “incorporation by reference doctrine”  
 26 because they have been provided in full and are referenced in the Complaint, undisputed,  
 27 and central to both parties’ arguments. See Biltmore Assocs., LLC v. Twin City Fire Ins.  
Co., 572 F.3d 663, 665 n.1 (9th Cir. 2009). The Court also takes judicial notice of the  
 28 complaints in the two underlying cases for similar reasons and because these court filings  
 are matters of public record. See Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999  
 (9th Cir. 2018).

<sup>2</sup> Technically, two consecutive year-length policies. (Doc. 1 at 9).

1       The section pertaining to “personal and advertising injury liability” contains a  
 2 number of exclusions. (Id. at 41-44). The section begins by stating, “This insurance does  
 3 not apply to:” before providing a list of exclusions. Each exclusion contains a heading in  
 4 bold with every word capitalized and then non-bold and uncapitalized statements  
 5 underneath the heading.

6       One such exclusion pertains to **“Material Published Prior To Policy Period.”**  
 7 ‘Personal and advertising injury’ arising out of oral or written publication, in any manner,  
 8 of material whose first publication took place before the beginning of the policy period.”  
 9 (Id. at 41).

10       Another such exclusion is headed **“Infringement of Copyright, Patent,  
   Trademark Or Trade Secret.”** (Id. at 42). This exclusion contains two subsections: (i)(1)  
 11 and (i)(2). (Id.) Subsection (i)(1) states: “‘Personal and advertising injury’ arising out of  
 12 the actual or alleged infringement of copyright, patent, trademark, trade secret or other  
 13 intellectual property rights.” (Id.) Subsection (i)(2) states: “‘Personal and advertising  
 14 injury’ arising out of the actual or alleged use of another’s images, photographs, likenesses  
 15 or personal attributes whether altered or unaltered.” (Id.)

16       During litigation in the two earlier cases, Watford denied the strip clubs’ request for  
 17 defense and coverage. (Id.) On September 23, 2022, Plaintiffs filed a Complaint in this  
 18 Court, bringing a breach of contract action against Watford. (Doc. 1). Plaintiffs argue that  
 19 Watford was obligated under the terms of the Policies to defend and cover the strip clubs.  
 20 (Id. at 12). They do so as assignees of the two strip clubs, who each assigned all of their  
 21 claims against Watford and rights under the Policies to Plaintiffs. (Id. at 3, 9, 12). Plaintiffs  
 22 seek compensation for the costs and expenses incurred in the underlying cases, a defense  
 23 and indemnity under the operative insurance policies, the full amount of the Dalton and  
 24 4Play judgments, costs and disbursements, and all accruing interest. (Id. at 3-4).

25       On December 19, 2022, pursuant to Rule 12(b)(6), Watford filed a Motion to  
 26 Dismiss for Failure to State a Claim. (Doc. 14). The Motion is fully briefed. (Docs. 17, 20).

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1       **II.     LEGAL STANDARD**

2       A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a  
 3       complaint. Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation omitted). Rule  
 4       12(b)(6) must be read in conjunction with Rule 8, which requires “a short and plain  
 5       statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2);  
 6       see also Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). A complaint need  
 7       not provide detailed factual allegations but must provide more than “labels and  
 8       conclusions.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). It must contain  
 9       factual allegations sufficient to raise a right to relief above the speculative level and to  
 10      “state a claim that is plausible on its face.” Id. at 555, 570. “A claim has facial plausibility  
 11      when the pleaded factual content allows the court to draw the reasonable inference that the  
 12      defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
 13      (citing Twombly, 550 U.S. at 556). A court may dismiss a claim either because it lacks “a  
 14      cognizable legal theory” or because it fails to allege sufficient facts to support a cognizable  
 15      legal claim. See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780,  
 16      783 (9th Cir. 1996).

17       When a court is deciding a motion to dismiss, “[a]ll allegations of material fact are  
 18      taken as true and construed in the light most favorable to the nonmoving party.” Smith v.  
 19      Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996) (citing Everest & Jennings v. American  
 20      Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994)). However, legal conclusions couched  
 21      as factual allegations are not given a presumption of truthfulness, and “conclusory  
 22      allegations of law and unwarranted inferences are not sufficient to defeat a motion to  
 23      dismiss.” Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

24       Ordinarily, a court may not consider evidence outside the pleadings in ruling on a  
 25      Rule 12(b)(6) motion to dismiss. See United States v. Ritchie, 342 F.3d 903, 907 (9th Cir.  
 26      2003). However, courts may consider matters of judicial notice. (Id. at 908). “A court may  
 27      take judicial notice of matters of public record,” Khoja v. Orexigen Therapeutics, Inc., 899  
 28      F.3d 988, 999 (9th Cir. 2018). As such, judgments and other court documents are proper

1 subjects of judicial notice. See, e.g., United States v. Black, 482 F.3d 1035, 1041 (9th Cir.  
 2 2007). A Court is permitted to take judicial notice *sua sponte*. See, e.g., Callan v. N.Y.  
 3 Cnty. Bank, 643 Fed. Appx. 666, 666 (9th Cir. 2016).

4 Further, the “incorporation by reference” doctrine allows a court deciding a Rule  
 5 12(b)(6) motion to consider documents incorporated by reference, but not physically  
 6 attached to the complaint if such documents are central to the plaintiff’s claim and their  
 7 authenticity is undisputed. Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006) (citation  
 8 omitted).

### 9 **III. DISCUSSION**

10 At the center of this dispute is a disagreement as to the correct interpretation of an  
 11 exclusionary provision contained in each of the Policies. In its Motion to Dismiss, Watford  
 12 points to the Policies’ exclusion of coverage for “[p]ersonal and advertising injury’ arising  
 13 out of the actual or alleged use of another’s images, photographs, likenesses, or personal  
 14 attributes whether altered or unaltered.” (Doc. 14 at 7). This exclusion, Watford argues, is  
 15 unambiguous and Plaintiffs’ claims against 4Play and Dalton “fall squarely within” it. (Id.)

16 Plaintiffs deny that this exclusion applies to their claims. (Doc. 17 at 4). They also  
 17 argue that in the alternative, if the exclusion does apply, then it is void because it renders  
 18 illusory the protections it supposedly offers. (Id. at 9). Before addressing these arguments,  
 19 the Court will first establish some basic tenets of insurance policy interpretation.

20 The “interpretation of an insurance contract is a question of law . . . .” Sparks v.  
 21 Republic Nat'l Life Ins. Co., 647 P.2d 1127, 1132 (Ariz. 1982). An insurance policy is  
 22 “read as a whole, so as to give a reasonable and harmonious effect to all of its  
 23 provisions.” Charbonneau v. Blue Cross of Wash. & Alaska, 634 P.2d 972, 975 (Ariz. Ct.  
 24 App. 1981). Courts should attempt to give effect to all provisions so that none are “rendered  
 25 meaningless.” Am. Fam. Mut. Ins. Co. v. White, 65 P.3d 449, 453 (Ariz. Ct. App. 2003).  
 26 “Provisions of insurance policies are to be construed in a manner according to their plain  
 27 and ordinary meaning.” Sparks, 647 P.2d at 1132. “[W]here the provisions of the contract  
 28 are plain and unambiguous upon their face, they must be applied as written, and the court

1 will not pervert or do violence to the language used, or expand it [beyond] its plain and  
 2 ordinary meaning or add something to the contract which the parties have not put  
 3 there.” D.M.A.F.B. Fed. Credit Union v. Emps. Mut. Liab. Ins. Co. of Wis., 396 P.2d 20,  
 4 23 (Ariz. 1964). When policy language is unambiguous, a court may not create ambiguity  
 5 to find coverage. Sec. Ins. Co. v. Andersen, 763 P.2d 246, 248 (1988). “An interpretation  
 6 of a contract which renders it unreasonable should be avoided.” Custom Roofing Co. v.  
 7 Transamerica Ins. Co., 584 P.2d 1187, 1189 (Ariz. Ct. App. 1978).

8 If a clause in an insurance contract “appears ambiguous, [courts] interpret it by  
 9 looking to legislative goals, social policy, and the transaction as a whole.” First Am. Title  
 10 Ins. Co. v. Action Acquisitions, LLC, 187 P.3d 1107, 1110 (Ariz. 2008). “If an ambiguity  
 11 remains after considering these factors, [courts] construe it against the insurer.” Id. This  
 12 rule applies “with even greater force where the ambiguity appears in an exclusionary  
 13 clause.” Roberts v. State Farm Fire & Cas. Co., 705 P.2d 1335, 1336-37 (Ariz. 1985). “In  
 14 determining whether an ambiguity exists in a policy, the language should be examined  
 15 from the viewpoint of one not trained in law or in the insurance business.” Sparks, 647  
 16 P.2d at 1132. “Generally, the insured bears the burden to establish coverage under an  
 17 insuring clause, and the insurer bears the burden to establish the applicability of any  
 18 exclusion.” Keggi v. Northbrook Prop. & Cas. Ins. Co., 13 P.3d 785, 788 (Ariz. Ct. App.  
 19 2000).

#### 20           A.     **Whether the Exclusion Applies**

21       The Policies contain a three-and-a-half-page section dedicated to “Personal and  
 22 Advertising Injury Liability.” (Doc. 14-2 at 41). Under that section, Watford agrees to  
 23 “pay those sums that the insured becomes legally obligated to pay as damages because of  
 24 ‘personal and advertising injury’ to which this insurance applies. . . . However, we will  
 25 have no duty to defend the insured against any ‘suit’ seeking damages for ‘personal and  
 26 advertising injury’ to which this insurance does not apply.” (Id.)

27       The phrase ‘personal and advertising injury’ appears between apostrophes because  
 28 it is a defined term under the Policies. (Id. at 35). Under the Policies’ Definitions section,

1 the phrase is defined by six subsections, including as “injury . . . arising out of . . . oral or  
 2 written publication, in any manner, of another’s images, photographs, likenesses or  
 3 personal attributes.” (Id. at 50).

4 Clearly, Plaintiffs’ underlying claims fall under this term. Indeed, the parties do  
 5 not dispute that these claims represent a ‘personal and advertising injury’ as defined by  
 6 the Policies. The dispute is instead whether their claims are excluded by one of two  
 7 relevant exclusions. The section dedicated to “Personal and Advertising Injury Liability”  
 8 outlines a number of exclusions to coverage. (Id. at 41). Among these is section (i),  
 9 headed “Infringement of Copyright, Patent, Trademark or Trade Secret.” (Id. at 42).  
 10 Under this heading are two subsections: (i)(1) “‘personal and advertising injury’ arising  
 11 out of the actual or alleged infringement of copyright, patent, trademark, trade secret or  
 12 other intellectual property rights” and (i)(2) “‘personal and advertising injury’ arising out  
 13 of the actual or alleged use of another’s images, photographs, likenesses or personal  
 14 attributes whether altered or unaltered.” (Id.)

15 Because Plaintiffs’ claims in the underlying actions were centered around the  
 16 misappropriation of their likenesses, such claims—under the plain language of the  
 17 Policies—would seem to be excluded from coverage under (i)(2). To combat this  
 18 intuitive reading of the exclusion, Plaintiffs argue that this exclusion does not apply  
 19 because it must be understood in reference to the heading under which it appears—  
 20 “Infringement of Copyright, Patent, Trademark or Trade Secret.” (Doc. 17 at 5-7). The  
 21 Court must read (i)(2) in reference to the heading, Plaintiffs assert, so as to give meaning  
 22 to all terms, which means, here, to that heading. (Id.) Essentially, Plaintiffs argue that  
 23 (i)(2) excludes injuries arising out of the use of another’s images, photographs, or  
 24 likenesses only if such use is related in some way to copyright, patents, or trademarks.  
 25 Because Plaintiffs’ claims, they argue, are unrelated to copyright, patent, trademark, or  
 26 trade secret infringement, they are therefore not excluded by this provision. (Id.)

27 In reply, Watford argues that (i)(2) should not be read in conjunction with its  
 28 heading, citing a case from the District Court for the Northern District of California that

1 applies California law and a case from the Third Circuit. (Doc. 20 at 3). Watford also  
 2 argues that Plaintiffs' interpretation of this section would render (i)(2) itself superfluous.  
 3 (Doc. 20 at 5). If read Plaintiffs' way, Watford argues, (i)(2) is "already included" in the  
 4 much broader (i)(1), which includes *all* claims relating to copyright, patents, or  
 5 trademark. (*Id.*) Thus, (i)(2) becomes redundant if it only applies to claims relating to  
 6 copyright, patents, or trademark, which are already covered by (i)(1).

7 Watford has the better side of this argument. Although its placement is slightly  
 8 odd, the exclusion is clear and unambiguous. The Court will not create ambiguity to find  
 9 coverage, Andersen, 763 P.2d at 248, or expand the language beyond its plain and  
 10 ordinary meaning, D.M.A.F., 396 P.2d at 23, by awkwardly adding language to (i)(2) that  
 11 incorporates the heading under which it falls. Indeed, adding such language would simply  
 12 render that very subsection meaningless, as such a resulting exclusion would already be  
 13 covered by the broader (i)(1).

14 Even when placing (i)(2) in its broader context, Watford's interpretation prevails.  
 15 Section (i)(2), like the other exclusions, must be read in conjunction with the phrase that  
 16 begins the Exclusions section: "This insurance does not apply to: . . ." This language only  
 17 makes sense and forms full sentences when read in conjunction with the actual  
 18 subsections, such as (i)(2), rather than with the headings. As such, the exclusion clearly  
 19 reads: "This insurance does not apply to 'Personal and advertising injury' arising out of  
 20 the actual or alleged use of another's images, photographs, likenesses or personal  
 21 attributes whether altered or unaltered." This exclusion is unambiguous and excludes  
 22 Plaintiffs' underlying claims.

23 **B. Illusory Coverage**

24 Plaintiffs next argue that even if the Court were to agree with Watford as to the  
 25 applicability of section (i)(2), the Court should not apply the exclusion because doing so  
 26 would render the Policies' coverage illusory. (Doc. 17 at 7).

27 Plaintiffs cite a variety of cases for the proposition that courts should not interpret  
 28 insurance policies in such a way that would render coverage null or illusory. (Doc. 17 at 7-

1       9). Under Arizona law, “a policy interpretation that would result in no payment of benefits  
 2 under any reasonably expected circumstance—or ‘render coverage null’—is illusory.”  
 3 Hanover Ins. Co. v. Vemma Int'l Holdings Inc., Case No. CV-16-10710PHX-JJT, 2016  
 4 WL 4059606 at \*8 (D. Ariz. July 29, 2016) (citing Wilshire Ins. Co. v. S.A., 227 P.3d 504,  
 5 507-08 (Ariz. Ct. App. 2010); Aetna Cas. & Sur. Co. v. Dannenfeldt, 778 F. Supp. 484,  
 6 493 (D. Ariz. 1991)).

7       Here, (i)(2) renders neither null nor illusory the Policies’ coverage for ‘Personal and  
 8 Advertising Liability’—it simply narrows it. That section covers ‘personal and advertising  
 9 injur[ies],’ a term defined by six subsections, (15)(a) through (f). (Doc. 14-1 at 47).  
 10 Exclusion (i)(2) does not exclude all coverage under this section, only one form of it—that  
 11 defined by (15)(f). The Policies still provide coverage for five other forms of ‘personal and  
 12 advertising injury.’ (15)(a) through (e). As such, the Policies still offer the insured effective  
 13 protection for ‘personal and advertising liability.’

14       None of the cases cited by Plaintiffs constitute mandatory authority that this Court  
 15 must follow. Regardless, each of these cases demonstrate why (i)(2) does not render the  
 16 Policies’ coverage illusory. These cases focus on the “completeness” of the exclusion of  
 17 coverage. (*Id.* at 8-9) (citing Travelers Indemnity Co. of Conn. v. Richard McKenzie &  
 18 Sons, Inc., 10 F.4th 1255 (11th Cir. 2021). For example, in Travelers Indemnity, the  
 19 Eleventh Circuit held that coverage was illusory where a policy “grants coverage with one  
 20 hand and then with the other *completely* takes away the *entirety* of that same coverage.  
 21 *Completeness is the key.*” 10 F.4<sup>th</sup> at 1265 (emphasis added). Similarly, ACE Cap. Ltd. v.  
 22 Morgan Waldon Ins. Mgmt., LLC, 832 F.Supp.2d 554, 572 (W.D. Pa. 2011) and Aspen  
 23 Specialty Ins. Co. v. 4 NYP Ventures, LLC, 162 F.Supp.3d 337, 345 (S.D.N.Y. 2016) both  
 24 hold that coverage is illusory when “the insured purchases no effective protection.” The  
 25 other cited cases all also emphasize that the exclusions must effectively eliminate coverage  
 26 completely in order to render coverage illusory.

27       Again, (i)(2) does not “completely” remove coverage. 10 F.4<sup>th</sup> at 1265. The strip  
 28 clubs did not “purchase[] no effective protection.” 832 F.Supp.2d at 572; 162 F.Supp.3d at

1 345. The exclusion simply narrows coverage. As such, the Policies' coverage for 'personal  
 2 and advertising liability' is neither rendered null nor illusory.

3       **C.     Libel and Slander Coverage**

4 Plaintiffs argue that Watford was not only obligated to defend and indemnify the  
 5 strip clubs because their underlying claims involved the use of another's photo, image, and  
 6 likeness, but also because they involved allegations of libel and slander. (Doc. 17 at 11).  
 7 One of the definitions of 'personal and advertising injury' under the Policies is "oral or  
 8 written publication, in any manner of material that slanders or libels a person . . . or  
 9 disparages a person's . . . goods, products, or services." (Doc. 14-1 at 47). Here, Plaintiffs  
 10 claim that their image and likeness constitute their 'goods, products, or services.' (Doc. 17  
 11 at 11). Plaintiffs assert that both underlying complaints alleged disparagement of Plaintiffs'  
 12 goods, products, or services, and therefore Watford was obligated to defend and indemnify  
 13 the strip clubs in relation to those complaints. (*Id.*)

14 Plaintiffs argue that the Dalton Complaint alleged such disparagement by alleging  
 15 under its false light invasion of privacy claim that Dalton's use of their images created an  
 16 impression about Plaintiffs that would be "objectionable to a reasonable person" and had  
 17 harmed Plaintiffs' "professional reputation[s]." (*Id.*) (citing Doc. 43 at 24).

18 As for the 4Play Complaint, Plaintiffs highlight the repeated allegations of  
 19 "irreparable harm" to the Plaintiffs' "reputation[s] and brand[s]" through the  
 20 advertisements' attribution to the Plaintiffs of the strip club's "adult entertainment and  
 21 striptease lifestyle and activities." (Doc. 17 at 11) (citing Doc. 14-4 at 41, 43).

22 In response, Watford argues that section (i)(2) excludes Plaintiffs' claims because  
 23 such claims arose out of the use of the models' images, photographs, or likenesses. (Doc.  
 24 20 at 8).

25 Again, Watford has the better side of this argument. Regardless of whether Plaintiffs  
 26 adequately pled libel and disparagement claims sufficient to trigger coverage under the  
 27 Policies, such allegations are clearly excluded by (i)(2). Any such libel, slander, or  
 28 disparagement arose out of the strip clubs' use of Plaintiffs' image, photographs, and

1       likenesses and was thus excluded by (i)(2). As Watford notes, none of the cases relied  
 2 upon by Plaintiffs include an exclusionary clause similar to (i)(2).

3       Again, this does not render coverage null or illusory. The Policies still offer  
 4 coverage for injuries arising out of oral or written publications that slander or libel—so  
 5 long as such injuries do not arise out of the use of another’s image, photographs, or  
 6 likeness. The archetypal instances of libel or slander—a public written or oral statement  
 7 disparaging an individual or entity—remain covered by the Policies.

8           **D. Prior Publication**

9       Watford also argues that the claims of Plaintiffs Pinder, Hathaway, Ratchford, and  
 10 Patrick were excluded from coverage because their images were first published before the  
 11 policy periods began. (Doc. 14 at 8). The Policies’ section dedicated to “Personal and  
 12 Advertising Injury Liability” includes an exclusion headed “material published prior to  
 13 policy period.” (Doc. 14-2 at 41). Specifically, the Policies do not apply to “personal and  
 14 advertising injury’ arising out of oral or written publication, in any manner, of material  
 15 whose first publication took place before the beginning of the policy period.” (*Id.*)

16           **(1) Prior Publication of Patrick**

17       Plaintiffs acknowledge that 4Play first published an image of Patrick seven months  
 18 prior to the start of the insurance policy. (Doc. 17 at 14). However, because that initial  
 19 publication was on 4Play’s Instagram page and subsequent publications were on their  
 20 Facebook page, Plaintiffs argue that the publications reached different audiences and thus  
 21 do not constitute republication and are not covered by this prior publication exclusion. (*Id.*)  
 22 In reply, Watford argues that because the later publications on Facebook were substantially  
 23 similar to the prior publication on Instagram, the prior publication rule applies. (Doc. 20 at  
 24 10).

25       To aid their argument that the prior publication exclusion does not apply when  
 26 material is republished on a different platform because the new platform represents a new  
 27 audience, Plaintiffs cite to Larue v. Brown, 333 P.3d 767 (Ariz. Ct. App. 2014). However,  
 28 as Watford points out, the Larue court’s analysis was made in a different context. Larue

1 deals with the single publication rule, which protects defendants from being sued separately  
 2 for each copy of a book or newspaper containing an allegedly defamatory statement and  
 3 prevents the statute of limitations from being reset each time a copy of that publication is  
 4 purchased or read. Id. at 771-72. Neither Larue nor the other two cases that Plaintiffs cite  
 5 address the issue raised here—the applicability of a prior publication exclusion in an  
 6 insurance contract.

7 More on point is Street Surfing, LLC v. Great Am. E & S Ins. Co., which deals with  
 8 an almost identical prior publication exclusion in an insurance policy. 776 F.3d 603, 610  
 9 (9th Cir. 2014). A prior publication exclusion, the Ninth Circuit explained, is designed to  
 10 “bar coverage when the wrongful behavior . . . began prior to the effective date of the  
 11 insurance policy.” Id. (punctuation removed) (quoting Taco Bell Corp. v. Cont'l Cas. Co.,  
 12 388 F.3d 1069, 1072 (7th Cir. 2004). “[T]he exclusion bars coverage of injuries arising out  
 13 of republication of that advertisement, or any substantially similar advertisement . . .  
 14 because such later publications are part of a single, continuing wrong that began before the  
 15 insurance policy went into effect.” Id. A later advertisement is thus excluded if it is  
 16 “substantially similar” to the pre-coverage advertisement. Id.

17 As the Street Surfing court noted, in assessing whether a subsequent advertisement  
 18 is “substantially similar” to a pre-coverage advertisement, courts do not consider all  
 19 differences between them, but instead “focus[] on the relationship between the alleged  
 20 wrongful acts manifested in” the advertisements. Id. at 612-613 (italics omitted). For  
 21 instance, in Taco Bell Corp., the Seventh Circuit used an example of a copyright-infringing  
 22 article originally published in a magazine and then later republished as part of an anthology.  
 23 388 F.3d at 1073. Even though the anthology would be a “much different [] work”, the  
 24 wrongful act—that is, the copying of the copyrighted article without authorization—  
 25 “would be the same” and therefore the prior publication exclusion would apply. Id.

26 The Seventh Circuit’s analogy, also referenced in Street Surfing, is an apposite one  
 27 here. In the present case, the pre-coverage advertisement was published on Instagram and  
 28 the subsequent advertisements were published on Facebook, just as in the Seventh Circuit’s

example the pre-coverage publication took place in a magazine and the subsequent publication occurred in an anthology. The wrongful act—there, the use of a magazine article without authorization and here, the use of Patrick’s likeness without authorization—is the same. The fact that Facebook and Instagram might have different audiences is irrelevant—just as the fact that a magazine and an anthology might have different audiences was irrelevant to the Street Surfing and Taco Bell Corp. courts. Because the wrongful use of Patrick’s likeness without her authorization was the same in both the pre-coverage and coverage periods—indeed, 4Play used the very same image—the insurance policy’s prior publication exclusion applies. Watford therefore had no duty to defend or indemnify 4Play for the claims made by Patrick.

## **(2) Prior Publication of Pinder, Hathaway, and Ratchford**

The advertisements featuring Pinder, Hathaway, and Ratchford require a different analysis. Unlike the pre- and post- coverage period advertisements featuring Patrick, which were identical save for the platform on which they were published, Plaintiffs did not allege—and the parties do not agree—that these advertisements were identical. There does not appear to be any shared understanding between the parties as to the number and content of these advertisements.

Watford argues that the prior publication exclusion applies to these three Plaintiffs because in their complaint in the underlying action, Plaintiffs allege that the first advertisements were published before the coverage period began. (Doc. 14 at 9-10). Watford notes that in the Dalton Complaint, Plaintiffs did not allege that any advertisements published during the coverage period were different to the pre-coverage advertisements. (Id. at 10).

Plaintiffs counter that when Watford denied Dalton coverage, it had not seen the advertisements of the three models that had been published during the policy period because these advertisements were not attached as exhibits to the complaint. (Doc 17 at 15). As a result, Watford’s Motion to Dismiss does not compare the content of the images published pre-coverage period and those published during the coverage period. (Id. at 15-

1       16). In their Response, Plaintiffs attach some of these advertisements as exhibits, (Doc. 17-  
 2       5), and highlight differences between the pre-coverage images and the images published  
 3       during the coverage period. (Doc. 17 at 16-17).

4           However, the Court may not consider these advertisements. A court may consider  
 5       documents offered by a *defendant* in a motion to dismiss if the documents form the basis  
 6       of the plaintiff's complaint or if the complaint makes extensive reference to the documents.  
 7       Khoja, 899 F.3d at 1002. Hence, this court's examination of the two Policies. However,  
 8       there is a general prohibition against a *plaintiff's* introduction of evidence at the motion to  
 9       dismiss stage. *Id.* The purpose of this prohibition is to prevent plaintiffs from "selecting  
 10      only portions of documents that support their claims, while omitting portions of those very  
 11      documents that weaken . . . their claims." *Id.* (citation omitted).

12       Plaintiffs may not incorporate by reference the attached advertisements. The  
 13      rationale behind this prohibition is made clear in this case because Plaintiffs have not  
 14      attached all the relevant advertisements. Rather, they have only attached three  
 15      advertisements featuring Ratchford and one featuring Rosario (who Watford has not  
 16      claimed is excluded under the prior publication exclusion). (Doc. 17-5). They have not  
 17      supplied advertisements featuring Pinder or Hathaway and it is possible that 4Play used  
 18      other, non-attached advertisements featuring Ratchford.

19       As for the fact that the Dalton Complaint did not affirmatively allege that the  
 20      advertisements posted pre- and post- coverage period were different, nor did that complaint  
 21      allege that they were identical or even similar. This is in stark contrast to the 4Play  
 22      Complaint's allegations surrounding Patrick, where the 4Play Plaintiffs alleged that the  
 23      post-coverage period advertisements featuring Patrick constituted a "re-upload[]" of "the  
 24      same image" that had been posted before the coverage period. (Doc. 14-4 at 21). Although  
 25      Watford might ultimately prevail on the applicability of the prior publication rule as to  
 26      Pinder, Hathaway, and Ratchford's claims, the Court cannot make any determination on  
 27      the issue at the motion to dismiss stage, based on the underlying complaints and the Polices  
 28      alone.

1       The Court must therefore deny Watford's Motion to Dismiss as it relates to the prior  
 2 publication of advertisements featuring Pinder, Hathaway, and Ratchford. The Court does  
 3 not have all of the relevant advertisements before it and the precise number and content of  
 4 these advertisements is not currently in the record. Any analysis here will likely involve  
 5 the comparison of various advertisements and a determination as to whether advertisements  
 6 published pre- and post- coverage period are "substantially similar." This constitutes a  
 7 question of fact, requires discovery, and is thus not suitable for determination at the motion  
 8 to dismiss stage. Regardless, Pinder, Hathaway, and Ratchford's claims must be dismissed  
 9 because they are excluded under the plain and unambiguous language of section (i)(2), as  
 10 discussed above.

11 **IV. CONCLUSION**

12       Watford was not obligated to cover and indemnify Watford and 4Play in the  
 13 underlying actions because the operant Policies excluded coverage for Plaintiffs' claims.  
 14 Those Policies also excluded the claims brought by Plaintiff Tara Leigh Patrick on separate  
 15 grounds. As such, the Court will grant Watford's Motion to Dismiss.

16       When granting a motion to dismiss based on Rule 12(b)(6), a court must give the  
 17 plaintiff leave to amend, unless it finds that any amendment would be futile. See Lopez v.  
18 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc); Bly-Magee v. California, 236 F.3d  
 19 1014, 1019 (9th Cir. 2001). Here, it is unclear how Plaintiffs could cure their Complaint  
 20 because they cannot change the underlying complaints or the Policies, which are  
 21 undisputed and form the basis of this ruling. As such, the Court finds that any amendment  
 22 would be futile and will dismiss Plaintiffs' claims with prejudice.

23       Accordingly,

24 **IT IS HEREBY ORDERED** granting Defendant's Motion to Dismiss. (Doc. 14).

25 **IT IS FURTHER ORDERED** dismissing with prejudice Plaintiffs' claims.

26       ///

27       ///

28       ///

III

**IT IS FURTHER ORDERED** directing the Clerk of the Court to terminate this action.

Dated this 6th day of March, 2023.

Stephen McNamee

Honorable Stephen M. McNamee  
Senior United States District Judge